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11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13
14 JOEL RUIZ, On Behalf of Himself and All
15 Others Similarly Situated,

16 Plaintiff,

17 vs.

18 GAP INC., and VANGENT, INC.,

19
20 Defendant.

21 Case No. CV07-05739-SC

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28 **PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
MOTIONS TO STRIKE AND
OBJECTIONS TO PLAINTIFF'S
EXPERT REPORTS**

Judge: Honorable Samuel Conti

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1 Plaintiff Joel Ruiz (“Plaintiff”) submits the following Memorandum of Points in
 2 Authorities in opposition to Gap, Inc. (“Gap”) and Vangent, Inc.’s (“Vangent”) Motion to Strike
 3 and Objections to Plaintiff’s Expert Reports, Docket No. 114 (“Mot. to Strike”).

4 **I. INTRODUCTION**

5 In a flagrant effort to supplement their summary judgment briefing and their Opposition
 6 to Plaintiff’s Motion for Class Certification (which merely reiterated their summary judgment
 7 arguments), Defendants Gap and Vangent have filed a “motion to strike” Plaintiff’s experts.
 8 Their motion, however, is procedurally improper and a moving target in that it inconsistently
 9 applies Fed. R. Civ. P. 12(f), Fed. R. Evid. 401 and/or 702. Moreover, the motion is aimed at
 10 forcing the Court to weigh factual issues, denying Plaintiff and the putative Class a full and fair
 11 opportunity to adjudicate the case. In its motion at bar, Defendants seek to strike the *findings* of
 12 Plaintiff’s experts. (*See* Mot. to Strike at 3-6.) Thus, the majority of Defendants’ motion attacks
 13 the *weight* of the experts’ findings – an inappropriate argument for a motion to strike as it
 14 removes disputed facts from the jury—and not admissibility of the reports, a matter for the
 15 Court. This is ironic because the Defendants claim in their motion for summary judgment that
 16 there are no factual disputes. The experts’ findings involve facts that are in dispute in the case
 17 and should be weighed by a jury at trial. Plaintiff respectfully asks this Court to deny
 18 Defendants’ Motion to Strike as substantively improper.

19 Defendants also use their motion to strike to argue that Plaintiff has not suffered a
 20 compensable injury. (*See* Mot. to Strike at 1-2.) Defendants thus raise issues that are
 21 inappropriate to consider in determining the admissibility of expert opinions and are duplicative
 22 of other motions and oppositions filed by Defendants. In fact, Defendants already raised this
 23 issue in their motion for summary judgment and opposition to plaintiff’s class certification
 24 motion, also currently pending before the Court.¹

25
 26 ¹ In order to efficiently use the time of the Court, Plaintiff has already addressed the
 27 argument on injury in his response to the motion for summary judgment and class certification
 28 reply and will limit his response to those arguments here.

1 Had Defendants legitimately sought to test Plaintiffs' experts, then instead of a
 2 procedurally improper motion to strike that re-hashes arguments already briefed, they would
 3 have filed a Motion to Exclude under Fed. R. Evid. 702. Rather, they (ostensibly) filed a Motion
 4 to Strike under Fed. R. Civ. P. 12(f) while including no citations to the appropriate legal standard
 5 under the federal rules. By using the motion to strike to duplicate its motion for summary
 6 judgment and argue their opposition to class certification, Defendants convert what should be a
 7 method of conserving the Court's resources into a means of wasting them. Moreover,
 8 Defendants' Motion to Strike confusingly weaves the concepts of injury, relevancy, and
 9 reliability interchangeably and conveniently forgets to include the proper standards that should
 10 be applied to Plaintiff's experts' opinion, such as Rule 705.

11 **II. ARGUMENT**

12 **A. Legal Standard**

13 Motions to strike are generally disfavored by courts and seldom granted. *See Bureeong v.*
 14 *Uvawas*, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996); *Colaprico v. Sun Microsystems, Inc.*, 758 F.
 15 Supp. 1335, 1339 (N.D. Cal. 1991); *see also* Wright & Miller, *Federal Practice & Procedure* 2d
 16 § 1380 n.9. A motion to strike should be granted only if it is clear that the matter to be stricken
 17 "could have no possible bearing on the subject matter of the litigation." *Colaprico*, 758 F. Supp.
 18 at 1339; *see also* *Naton v. Bank of California*, 72 F.R.D. 550, 551 n.4 (N.D. Cal. 1976). If any
 19 doubt remains as to the potential relevance of the matter, the motion should be denied.
 20 *Montecino v. Spherion Corp.*, 427 F. Supp. 2d 965, 966-67 (C.D. Cal. 2006). Motions to strike
 21 will not be granted if the Court is asked to draw factual inferences or decide disputed questions
 22 of fact. *See Augustus v. Board of Public Instruction of Escambia County, Fla.*, 306 F.2d 862,
 23 868 (5th Cir. 1962).

24 Defendants' misunderstanding of the appropriate use of a motion to strike is shown by their
 25 failure to cite to a single case discussing the legal standard for such a motion under Fed. R. Civ.
 26 P. 12(f). Under the Motion to Strike standard, a court should strike from a *pleading* only

1 “redundant, immaterial,² impertinent, or scandalous matters.” Fed. R. Civ. P. 12(f). Expert
 2 reports are not “pleadings” as defined by Federal Rules. *See U.S. ex rel. Pogue v. Diabetes*
 3 *Treatment Ctr. of Am*, 474 F. Supp. 2d 75, 80 (D.D.C. 2007). Plaintiff’s experts’ opinions are
 4 clearly not redundant, are material, and are neither impertinent nor scandalous. The proper
 5 vehicle would have been a Motion to Exclude governed by the appropriate standard.

6 **B. Plaintiff’s Expert Opinions Are Reliable and Relevant under *Daubert*, Rule
 702, and Rule 705**

7 In support of his opposition to Defendants’ motion for summary judgment, Plaintiff
 8 provided the expert opinions of Mr. James Van Dyke and Dr. Larry Ponemon.³ Defendants
 9 attempt to discredit the bases and ultimate conclusions in these experts’ opinions. However,
 10 Defendants’ arguments go to the *weight*, not *admissibility* of the experts’ opinions and, as such,
 11 are insufficient bases to strike (or exclude) Plaintiff’s expert opinions. *See Bieghler v. Kleppe*,
 12 633 F.2d 531, 534 (9th Cir. 1980) (finding that the sufficiency of expert’s opinion to establish
 13 causation was not a determination for summary judgment, but rather, should be presented to the
 14 trier of fact). Regardless, Defendants’ criticisms of Dr. Ponemon and Mr. Van Dyke’s opinions
 15 are not well-founded.

16 Assuming the motion was properly filed as one to exclude, in determining whether an
 17 expert’s opinion should be excluded, a court will look to the requirements of Fed. R. Evid. 702.
 18 Rule 702 provides:

19 If scientific, technical, or other specialized knowledge will assist the trier of fact to
 20 understand the evidence or to determine a fact in issue, a witness qualified as an
 21 expert by knowledge, skill, experience, training, or education, may testify thereto
 22 in the form of an opinion or otherwise.

23 ² Defendants claim the reports are “irrelevant” (*See Mot. to Strike at 3.*) Immaterial is not
 24 the same as irrelevant. Immaterial addresses those allegations that either bear no essential
 25 relationship to the pleader’s claim or contain unnecessary statements. *See Fantasy, Inc. v.
 26 Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993). Relevancy is governed by FRE 402. *See* §II.B.,
 27 *infra*.

28 ³ However, despite Defendants’ confusion, only the Van Dyke report addressed the risk of
 29 future identity theft. The purpose of the Ponemon report was simply to opine on whether or not
 the laptop theft was a property or data crime.

1 Courts have broad discretion in evaluating an expert's testimony and are reluctant to exclude
 2 testimony that can be made reliable and relevant by further inquiry. *See Daubert v. Merrell Dow*
 3 *Pharm., Inc.*, 509 U.S. 579, 596 (1993) ("*Daubert I*") ("[v]igorous cross-examination,
 4 presentation of contrary evidence, and careful instruction on the burden of proof are the
 5 traditional and appropriate means" of countering expert testimony). While the trial court has a
 6 "gatekeeping" function to ensure all scientific information is reliable, it has broad discretion in
 7 exercising this function. *U.S. v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000). The trial court's
 8 role as gatekeeper is not intended to serve as a replacement for the adversary system, and "[t]he
 9 rejection of expert testimony is the exception rather than the rule." *Toomey v. Nextel Commc'n, Inc.*,
 10 No. C-03-2887, 2004 WL 5512967 at *2 (N.D. Cal. Sept. 23, 2004) (citation omitted).
 11

12 Expert testimony is admissible pursuant to Rule 702 if it is both relevant and reliable.
 13 *Mukhtar v. Calif. State Univ., Hayward*, 299 F.3d 1053, 1063 (9th Cir. 2002) (citing *Daubert I*).
 14 The Supreme Court emphasized that "[t]he inquiry envisioned by Rule 702 is . . . a flexible one,
 15 [citation omitted], and must be "tied to the facts of a particular case" *Id.* (citations omitted).
 16

1. Plaintiff's Experts' Opinions are Reliable

17 In determining whether evidence is reliable, "the district judge must determine whether
 18 the expert is qualified in the relevant field and whether the methodology underlying the expert's
 19 conclusions is reliable." *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 640 (7th Cir. 2003). As
 20 such, the court should apply a "flexible" test of reliability in examining an expert's technical
 21 knowledge and techniques, and the district court enjoys "the same broad latitude when it decides
 22 how to determine reliability as it enjoys in respect to its ultimate reliability determination."

23 *NutraSweet Co. v. X-L Eng'g. Co.*, 227 F.3d 776, 788 (7th Cir. 2000) (citation omitted). The
 24 court's task is to "analyze not what the experts say, but what basis they have for saying it."
 25 *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) ("*Daubert II*").
 26 //
 27 //

a. Mr. James Van Dyke and Dr. Larry Ponemon's "Specialized Knowledge" Qualify Them as Experts With Reliable Opinions

Under Rule 702, Dr. Ponemon and Mr. Van Dyke qualify as experts with specialized knowledge. Rule 702 is “broadly phrased and is intended to embrace more than a narrow definition of qualified expert.” *Thomas v. Newton Int’l Enter.*, 42 F.3d 1266, 1269 (9th Cir. 1994). A person with specialized knowledge may testify if their testimony will be helpful to the trier of fact in determining an issue of fact. *Rogers v. Raymark Indus., Inc.*, 922 F.2d 1426, 1429 (9th Cir. 1991). Specialized knowledge may be gained through practical experience in a particular field, not just through academic training. *Rogers*, 922 F.2d at 1429; *see also Hankey*, 203 F.3d at 1168-69 (finding a police officer with 21 years experience with the police department who worked 10 years undercover qualified to testify regarding gang membership and tenets); *Thomas*, 42 F.3d at 1269-70 (finding a witness with 29 years of longshore experience was qualified to give expert testimony about the working conditions of longshore personnel). Both James Van Dyke and Dr. Larry Ponemon are well-respected experts in the identity theft field, as demonstrated by their experience, their biographies, and their publications.

1. Mr. Van Dyke's "Specialized Knowledge" Qualifies Him As An Expert Witness

Mr. Van Dyke founded and has been the president of Javelin Strategy & Research since 2003 and worked in numerous positions as a leader in the security industry previously. (See Declaration of Rosemary M. Rivas in Opposition to Defendants' Motion for Summary Judgment Or, In the Alternative, Summary Adjudication ("Rivas MSJ Decl."), Docket No. 105, Ex. M (Expert Biography at 1).) Mr. Van Dyke and his company serve as experts on security and risk/fraud initiatives to countless members of the financial services industry. (See *id.*) Each year, Mr. Van Dyke and his company conduct an exhaustive and nationally-respected study of identity theft victims in the United States, based on the Federal Trade Commission's methodologies. (See *id.*) Mr. Van Dyke has presented testimony and presentations to countless public and private entities, including Congress, on the subject of identity fraud and data security.

1 (See *id.*) Mr. Van Dyke's extensive experience in identity fraud and the data security industry
 2 gives him specialized knowledge about identity theft and data breaches. *See Toomy*, 2004 WL
 3 5512967, at *5-8 (court found the expert was qualified by his job-related experience, courses
 4 taken, his masters thesis, and books he had written).

5

6 **2. Dr. Ponemon's "Specialized Knowledge" Qualifies Him
 As An Expert Witness**

7 Dr. Larry Ponemon is the Chairman and Founder of the Ponemon Institute, a research
 8 "think tank" dedicated to advancing privacy and data protection practices. (See Rivas MSJ
 9 Decl., Ex. N (Expert Biography at 1).) Dr. Ponemon's work and extensive knowledge has made
 10 him a leader in the privacy and data protection industry, and has led to the appointment of Dr.
 11 Ponemon by the White House, the Federal Trade Commission, and the state of California to
 12 Advisory Committees and task forces aimed at guiding the government in its handling of privacy
 13 and data protection concerns. (See *id.*) Dr. Ponemon has written and presented hundreds of
 14 articles and speeches on his studies of data breaches, *particularly those due to laptop thefts*, and
 15 has served as an expert in several data breach cases, including the Veteran Affairs Data Theft
 16 Litigation. (See *id.* at 1-2.) Dr. Ponemon and his Institute have conducted independent research,
 17 educated leaders from the private and public sectors, and verified the privacy and data protection
 18 practices of organizations in various industries. (See *id.*) Dr. Ponemon's experience in identity
 19 fraud and the data security industry gives him specialized knowledge about identity theft and
 20 data breaches and qualifies him to opine about the laptop theft at issue here.⁴

21 //

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26 ⁴ Plaintiff further disputes that Dr. Ponemon and Mr. Van Dyke need to be criminologists
 27 in order to opine on a case that is clearly within the subject of their expertise and study: privacy
 security and data breaches. (See Mot. to Strike at 6-7.)

b. **Mr. Van Dyke and Dr. Larry Ponemon Provide Sufficient Details of The Basis of Their Opinions and Used Their Experience and Tested Methodologies To Provide Reliable Opinions.**

Plaintiff's experts rely on vast experience and tried methodologies to reach their opinions. Such opinions cannot be "stricken" because Defendants simply disagree with their conclusions.

As an initial matter, Plaintiff is surprised at Defendants' misleading statement that Dr. Ponemon and Mr. Van Dyke "conveniently ignore (or were not shown)" the reports provided by the FBI, the Chicago Police, Dr. Rubin and Gap. (See Rivas MSJ Decl., Ex. N (Expert Opinion at ¶1).) As Defendants are aware from each experts' lists of materials upon which they relied, Plaintiff's experts were shown all of these materials and reviewed them in preparation of their reports. Specifically, the Rubin Report and NISA Report, which included the FBI and Chicago Police Department's determinations was specifically identified. (See *id.*) ("In addition, I relied on the following documents... National Investors & Security Agency report... [and] Investigation notes of [Gap employee] Keith White", among other materials); Mr. Van Dyke Report stating the expert's reliance on "National Investors & Security Agency Report ... Dr. Aviel Rubin's Report".) (See *id.*, Ex.M (Expert Op. at ¶2).) As Defendants know, the National Investors & Security Agency Report ("NISA Report") and Dr. Aviel Rubin's Report ("Rubin Report" contained reports and conclusions of the FBI, the Chicago Police, Dr. Rubin and Gap. (See Rivas MSJ Decl., Ex. G; Ex. K.) These reports and the facts therein were considered, were relied upon in reaching the conclusions in both the experts' reports, and should not be excluded because of the mere fact that Plaintiff's experts reached a different conclusion about the Gap laptop theft and its implications than Defendants would prefer.

i. Mr. Van Dyke's Opinion Is Reliable

Mr. Van Dyke reached his opinion that the Gap laptop theft increased the risk of identity theft for the Class based on reliable statistics and methodologies as well as his vast expertise in the areas of identity theft and data breaches. Despite Defendants' accusations, Mr. Van Dyke

1 accurately applied his experience and studies *to the case at hand* in order to reach his
 2 conclusions.

3 First, Defendants argue that Van Dyke's survey is unreliable because it is not known
 4 whether it has been subject to peer-review and the methodology is allegedly not described in
 5 sufficient detail. (See Mot. to Strike at 5.) First, "peer-review" is a benchmark generally applied
 6 to research produced purely from the academic or scientific community, as opposed to
 7 commercially provided research. However, whether or not one of the studies that Mr. Van Dyke
 8 relies on for his report was peer-reviewed is by no means a reason by which to exclude Mr. Van
 9 Dyke's opinion. The "lack of peer review will rarely, if ever, be the single dispositive factor that
 10 determines the reliability of expert testimony." *Smith v. Ford Motor Co.*, 215 F.3d 713, 720 (7th
 11 Cir. 2000); *see also Gomez v. U.S. of America*, 2005 WL 5957818 (C.D. Cal. 2005) ("No single
 12 *Daubert* factor is determinative of whether the expert testimony is reliable.") (citation omitted).

13 In *Smith*, the Court recognized that if an expert were applying well-established
 14 techniques or using a methodology based on extensive practical experience, then the absence of
 15 peer review would not cast doubt on the expert's reliability. *Smith*, 215 F.3d. at 720-21. The
 16 *Smith* Court also found that whether publication was typical for the type of methodology
 17 employed was a consideration in the analysis. *Id.* at 720.

18 Further, where research is unrelated to the litigation - such as Javelin Strategy &
 19 Research's 2009 *Identity Fraud Survey Report* on which Mr. Van Dyke's in part relies for his
 20 opinion -, it may be reliable without peer review. *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d
 21 832, 843 (9th Cir. 2001) (citing *Daubert II*, 43 F.3d at 1317). In fact, the Ninth Circuit has found
 22 that where "testimony proffered by an expert is based directly on legitimate, preexisting research
 23 unrelated to the litigation" this is a "very significant fact" and "provides the most persuasive
 24 basis for concluding that the opinions he expresses were 'derived by the scientific method.'" *Daubert II*, 43 F.3d at 1317. The Ninth Circuit recognized that independent research is naturally
 25 unbiased and reliable:

1 [A]n expert [who] testifies based on research he has conducted independent of the
 2 litigation provides important, objective proof that the research comports with the
 3 dictates of good science. For one thing, experts whose findings flow from existing
 4 research are less likely to have been biased toward a particular conclusion by the
 5 promise of remuneration; when an expert prepares reports and findings before
 6 being hired as a witness, that record will limit the degree to which he can tailor his
 7 testimony to serve a party's interests. Then, too, independent research carries its
 8 own indicia of reliability, as it is conducted, so to speak, in the usual course of
 9 business and must normally satisfy a variety of standards to attract funding and
 10 institutional support.

11 *Daubert II*, 43 F.3d at 1317 (citation omitted). The 2009 *Identity Fraud Survey Report* on which
 12 Mr. Van Dyke relies was conducted and published independently of this litigation - as it has been
 13 every year since 2003 - and prior to Mr. Van Dyke's being hired as an expert or consultant in this
 14 litigation. (See Rivas Decl., Ex. M (Expert Biography at 2).) Such independent research "carries
 15 with it its own indicia of reliability" and should be awarded the properly credence accordingly.

16 *See id.*

17 Additionally, Mr. Van Dyke's underlying methodology was explained in sufficient detail
 18 and he relied "upon a variety of objective, verifiable evidence." *Clausen v. M/V New Carissa*,
 19 339 F.3d 1049, 1060-61 (9th Cir. 2003) (finding expert testimony was admissible where the
 20 expert relied upon surveys, clinical examinations, and government reports). Mr. Van Dyke
 21 provides sufficient detail of his underlying facts and data. For instance, Mr. Van Dyke based his
 22 opinion in part on the 2009 *Identity Fraud Survey Report*, generated by Mr. Van Dyke's
 23 company. The 2009 *Identity Fraud Survey Report*, is "of comparable design methodology to the
 24 2003 Federal Trade Commission Identity Theft Survey Report." (See Rivas MSJ Decl., Ex. M
 25 (Expert Op. at ¶2).) The 2003 Federal Trade Commission Identity Theft Survey Report is a
 26 publicly available document. *See Federal Trade Commission – Identity Theft Survey Report*,
 27 prepared by Synovate (September 2003) *available at* <http://www.ftc.gov/os/2003/09/synovatereport.pdf> (methodology described at 3). Mr. Van Dyke goes into further detail
 28 regarding the 2009 *Identity Fraud Survey Report*'s methodology by describing the methods by

1 which the data was collected and the sample from which it was taken.⁵ (See Rivas MSJ Decl.,
 2 Ex. M (Expert Op. at ¶3).) More to the point, Mr. Van Dyke goes into great detail by providing
 3 substantial data to support his opinion that the Class has been placed at a significantly higher risk
 4 of becoming identity theft victims as a result of the Gap laptop theft. (See Rivas MSJ Decl., Ex.
 5 M (Expert Op. at ¶¶4, 6, 9, 11, 12).)

6 Moreover, even if the Court found that Mr. Van Dyke's opinion lacked underlying facts
 7 and data, Rule 705 permits an expert to give opinion testimony without first testifying to the
 8 underlying facts or data. *See* Federal Rule of Evidence 705; *Bieghler*, 633 F.2d at 533. As the
 9 *Bieghler* court stated, an expert can provide an understanding of the basis of his opinions without
 10 describing them in detail:

11 The expert's affidavit here affirmatively showed his qualifications as an expert in accident
 12 reconstruction and the study he had undertaken to form his opinions. Although it did not
 13 describe in detail how he had arrived at his conclusions, the affidavit gave more than a
 14 bare conclusion that defendants had been negligent and that their negligence caused the
 15 accident.

16 *Bieghler*, 633 F.2d at 532. Although Plaintiff maintains that Mr. Van Dyke provided sufficient
 17 detail of the underlying data and facts on which he relied, his opinion would still be admissible
 18 even without such detail since even Defendants never argue that Mr. Van Dyke merely provided
 19 a bare conclusion.

20 Defendants have failed to exercise their rights where Plaintiff's experts are concerned,
 21 and prefer to burden the Court instead. If Defendants truly believed that Mr. Van Dyke did not
 22 provide sufficient detail then they could have exercised their rights to gather such information
 23 since, under Rule 705, a party challenging an expert's opinion may always "require[] them to

24 ⁵ It is true that Mr. Van Dyke does not replicate the 50 questions asked in the 2009 *Identity*
 25 *Fraud Survey Report* or explain the "victim" sets in detail (perhaps due to a goal of providing a
 26 succinct report to the Court), as Defendants' brief complains. However, the 2009 *Identity Fraud*
 27 *Survey Report* is not Mr. Van Dyke's opinion but rather one of the materials on which Mr. Van
 28 Dyke relies. This distinction should be noted because Defendants are not demanding that
 Plaintiff's expert be stricken because he failed to provide the underlying facts used to reach his
 conclusion but because he failed to provide the facts underlying those facts.

disclose the underlying facts or data on cross-examination.” Rule 705; *Toomey, supra*. In *Bulthuis v. Rexall Corp.*, 789 F.2d 1315 (9th Cir. 1986), the Ninth Circuit further explained the interaction of Rule 56 and Rule 705:

Expert opinion is admissible and may defeat summary judgment if it appears the affiant is competent to give an expert opinion and the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not. If further facts are desired, the movant may request and the district court may require their disclosure.

8 *Bulthuis*, 789 F.2d at1318. Mr. Van Dyke’s opinion provides sufficient factual basis. Moreover,
9 Defendants have waived their argument that Mr. Van Dyke’s opinion did not provide sufficient
10 factual basis when they refused Plaintiff’s offer to produce Mr. Van Dyke as a deponent. Cf.
11 (See accompanying Declaration of Mark Punzalan in Support of Plaintiff’s Opposition to
12 Defendants’ Motions to Strike and Objections to Plaintiff’s Experts (“Punzalan Decl.”), Ex. A.)
13 declining to depose Plaintiff’s experts) *with Toomy*, 2004 WL 5512967, at *9-10 (court criticized
14 defendant for not obtaining the basis for expert’s theories and omission in the expert report was
15 thus rendered harmless error). If Defendants were truly interested in finding out the
16 confirmation bias, additional confidence intervals, or further details regarding the methodology
17 for the *2009 Identity Fraud Survey Report* or whether it was peer-reviewed (See Mot. To Strike
18 at 6), then a deposition would have easily answered these questions. It seems the Defendants
19 would rather waste the Court’s time with frivolous arguments than to resolve any legitimate
20 questions they may have regarding Mr. Van Dyke and his opinion.

ii. **Dr. Larry Ponemon's Opinion Is Soundly Based On the Facts of the Case At Hand and Is Therefore Reliable**

23 Dr. Ponemon's opinion that the laptop thefts were most likely aimed at the data rather
24 than a property theft is based on his years of experience in the field of privacy and data
25 protections and, specifically, his studies of data breaches involving laptop thefts. (*See* Rivas
26 MSJ Decl., Ex. N.) Despite Defendants' accusations, Dr. Ponemon accurately applied his

1 experience and studies *to the case at hand* in order to reach his conclusions. He reviewed all of
 2 the relevant information to reach his conclusions and his opinion should not be stricken because
 3 Defendants' disagree with it. Throughout his opinion, Dr. Ponemon supplied detailed reasoning
 4 for why and how he reached his opinion and has satisfied Rules 702 and 705. Moreover, just as
 5 Defendants waived their right to question Mr. Van Dyke's opinion for lack of basis, they have
 6 done so by refusing to depose Dr. Ponemon as well. (See Punzalan Decl., Ex. A.)

7 **2. Plaintiff's Experts' Opinions Are Relevant**

8 The crux of Defendants' Motion to Strike is the notion that the experts are not opining on
 9 the actual facts of this case and, thereby, are offering irrelevant opinions. (See Mot. to Strike at
 10 3.) Defendants, however, seek to constrict the universe of operative facts to those that suit their
 11 motion while ignoring the rest. However, Plaintiff's experts offer relevant opinions that evaluate
 12 the same facts on which Defendants have relied during this litigation. Defendants cannot label
 13 Dr. Ponemon and Mr. Van Dyke's opinions as "irrelevant" and stricken simply because the
 14 opinions differ from Defendants'.

15 Relevancy of testimony, governed by Fed. R. Evid. 401, looks to whether reasonable
 16 inferences can be drawn therefrom regarding a contested matter. Black's Law Dictionary, at
 17 1291 (6th ed. 1990). Thus, relevancy is not met only when it tends to prove or disprove a precise
 18 fact in issue but also when it tends to establish fact from which existence or nonexistence of fact
 19 in issue can be directly inferred. *Id.* (citation omitted). "Encompassed in the determination of
 20 whether expert testimony is relevant is whether it is helpful to the jury, which is the central
 21 concern of Rule 702." *Mukhtar*, 299 F.3d at 1053, n. 7 (citations omitted). As long as the
 22 "evidence is relevant and the methods employed are sound, neither the usefulness nor the
 23 strength of statistical proof determines admissibility under Rule 702." *Obrey v. Johnson*, 400
 24 F.3d 691, 696 (9th Cir. 2005) (citing *Metabolife Int'l*, 264 F.3d at 843. Objections to a study's
 25 completeness or the variables included (or not included) go the weight of the statistical evidence,

1 not the admissibility. *Obrey*, 400 F.3d at 695-96. As discussed above, Plaintiff's expert's
 2 methods and factual bases are sound. Their opinions also meet FRE 401 and are relevant.

3 The Court should note that not only are the experts' opinions relevant, they also create a
 4 genuine issue of material fact that is sufficient to defeat Defendants' motions for summary
 5 judgment. *Thomas*, 42 F.3d at 1270. In *Thomas*, the court noted that summary judgment is rarely
 6 granted in negligence cases because the question of whether a defendant acted reasonably is for
 7 the trier of fact to decide. *Id.* at 1269. There, the expert provided a declaration regarding the
 8 customary practices on vessels and opined that an uncovered deck opening was an extremely
 9 unusual and hazardous condition. *Id.* The district court refused to consider the declaration on the
 10 grounds that an inadequate foundation was provided for his qualifications as an expert and that
 11 his declaration contradicted case law. *Id.* The Ninth Circuit found this was reversible error. The
 12 Appellate Court found that the witness' 29 years of work experience qualified him as an expert
 13 and further noted that if the district court wanted more information about his qualifications, he
 14 should have been provided the opportunity to present it. *Id.* at 1270. Viewing the evidence in the
 15 light most favorable to plaintiff, the Court found that a genuine issue of material fact existed as
 16 to the issue of whether the unguarded hatch opening presented an unreasonably dangerous
 17 condition. *Id.* at 1270. Similarly, Dr. Ponemon and Mr. Van Dyke qualify as experts (as argued
 18 above) and offer opinions that present genuine issues of material fact as to whether the Gap
 19 laptop theft was a data or property crime and whether it increased the risk of identity theft for the
 20 Class. Thus, their opinions are relevant, illuminate the genuine issues of material facts involved
 21 in the case and will serve to help the trier of fact determine those genuine issues of material facts.

22 Defendants' objection to Plaintiff's expert opinions largely requests of this Court findings
 23 of ultimate fact: the premise that the theft was a property crime and hence, there will never be
 24 any identity theft. Defendants' argument that Plaintiff's expert reports are irrelevant, because
 25 they do not deal with these (disputed) "facts", is based on this faulty thesis. (See Mot. To Strike
 26 at 3-4.) Defendants offer no proof, other than their reassurance, that the putative Class has not
 27

1 suffered any identity theft. (*See id.*). Nor have the Defendants offered any admissible evidence
 2 showing that the laptop thefts were unquestionably property thefts rather than data thefts. From
 3 these faulty premises, Defendants argue that, to be relevant, Mr. Van Dyke's opinion needed to
 4 rely on statistics that reflect data breaches that occurred 18 months ago and did not cause any
 5 identity theft. (*See Mot. to Strike at 3-4.*) Defendants are incorrect.

6 Since the laptop theft, 42,000 people called Gap regarding the data breach. (*See*
 7 Punzalan Decl., Ex. C at 35:16-36:17.) Of those, 2,000 people's calls were "escalated" by Gap
 8 for various reasons, including claims that the individuals suffered identity theft. (*See id.* at
 9 106:13-18.) ("Q: What was the criteria for escalating the 2,000 people? A: Primarily if they said
 10 I believe I'm a victim of identity theft or if for some reason I think my account has been
 11 compromised, you know, any number of reasons. Of that 2,000, Gap somehow further whittled
 12 the claims of potential identity theft to 130. (*See id.* at 110:14-23.) (testifying that Gap is only
 13 able to identify vague criteria by which it determined whether a class member was a victim of
 14 identity theft). Gap further narrowed this number to 16 individuals. (*See id.* at 110:24-111:1.)
 15 None of Gap's 30(b)(6) deponents could testify about the type of documentation Gap received
 16 from individuals that claimed identity theft before those claims were ruled out by Gap. (*See*
 17 Punzalan Decl., Ex. B at 209:14-210:16; Ex. C at 115:13-15.) Gap itself somehow made a
 18 determination that all but 16 of these 2000 individuals did not suffer identity theft and then
 19 claims to have nevertheless made the determination that none of the 16 suffered identity theft
 20 either. (*See* Gap Inc. and Vangent, Inc.'s Joint Opposition to Plaintiff's Motion for Class
 21 Certification ("Defs.' Class Opp. Br."), Docket No. 109 at 4.) Gap made these determinations
 22 that no one suffered identity theft, without a standardized protocol for their representatives to
 23 follow, without requesting records from these individuals, and also failed to keep records of their
 24 investigation of these claims. (*See* Rivas MSJ Decl., Ex. A at 108:12-24; Ex. H at 173:7-25,
 25 225:10-226:9, 213:5-21.) Gap's own self-serving determination that there has been no identity
 26 theft as a result of the laptop theft could quite easily be wrong. Defendants' Motion to Strike
 27

1 seeks to discount Mr. Van Dyke's contrary opinion simply because he fails to rely on
 2 Defendants' flawed assertion. Respectfully, Defendants could have advanced their factual
 3 arguments via their own experts and cannot reasonably expect Messrs. Van Dyke and Ponemon
 4 to voice Defendants' erroneous opinions.

5 Mr. Van Dyke's opinion notes that it often takes a while for individuals to even realize
 6 that they are victims of identity theft. (*See* Rivas MSJ Decl., Ex. M (Expert Op. at ¶9.) Thus,
 7 identity theft may have occurred several times over as result of the Gap laptop theft but it has
 8 been thus far unreported (or reported and "ruled out" by Gap). Moreover, the report noted that
 9 such identity theft has been known to appear after twelve months. (*See id.* at ¶12.) Yet
 10 Defendants pounce on the fact that 18 months has passed with no acknowledged identity theft
 11 (save the possible 16 that Gap has not ruled out). (*See* Mot. to Strike at 4.) Plaintiff claims to
 12 need credit monitoring for more than one year to properly protect them from the loss of SSNs.
 13 His claims, and his expert reports, properly recognize the long-term risk while Defendants seek
 14 to minimize it to 18 months. It is for the jury to decide this factual question.

15 It would be great if Gap's assumptions were true – that 18 months have passed since the
 16 Gap laptop theft so the Class members are free and clear and have no reason to ever worry about
 17 identity theft as a result of the breach. Unfortunately, that is a faulty premise on which the Class
 18 cannot afford to rely and is based on a woefully inaccurate interpretation of Plaintiff's expert
 19 opinion. Defendants blatantly misrepresent Mr. Van Dyke's statistics by arguing that "Indeed,
 20 Van Dyke's own report states that only 10% of *all identity theft victims* had their data used after
 21 12 months of being notified of a data breach incident." (*See* Mot. to Strike at 4.) (emphasis
 22 added). This is most definitely not what Plaintiff's expert reported. Mr. Van Dyke stated that
 23 10% of those that could pinpoint when their information was obtained, reported that their
 24 information was used over a year later.⁶ (*See* Rivas MSJ Decl., Ex. M (Expert Op. at ¶12).) The

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 26
 27 ⁶ Regardless of this (albeit important) distinction, that 10% of the population (however
 28 defined) note that identity theft occurred over a year after the data breach supports Plaintiff's

1 exact language is: "Among the 37% of victims *who knew when their information was obtained*,
 2 10% reported their information was held of over a year before the misuse began." (See *id.*; see
 3 *also* (See Rivas MSJ Decl., Ex. N (Expert Op. at ¶8).) (reporting that criminals can hold
 4 personally identifying information for years before using it to commit identity fraud). Class
 5 members are at risk of becoming identity theft victims for years and Mr. Van Dyke's opinion is
 6 not irrelevant, even if Gap's assertion that there has been no identity theft after 18 months was
 7 true and reliable.

8

9 **C. The Specific Portions of Plaintiff's Experts' Reports Identified by
 Defendants Satisfy the Federal Rules of Evidence**

10 Defendants' evidentiary objections to the foundation, relevance, and basis of Plaintiff's
 11 experts' declarations are procedurally deficient and are incorrect. Defendants' attack on the
 12 relevance and foundation of Plaintiff's experts' testimony simply re-hashes their improper
 13 attempt to strike the testimony under Fed. R. Evid. 702. As noted in *Daubert*, "the Rules of
 14 Evidence - especially Rule 702 - do assign to the trial judge the task of ensuring that an expert's
 15 testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert I.*, 509
 16 U.S. at 597; *Cooper v. Brown*, 510 F.3d 870, 942-43 (9th Cir. 2007). As detailed above,
 17 Plaintiff's experts' testimony satisfies the requirements of Rule 702, and thus, Defendants'
 18 objections to the relevance and foundation of this same evidence are without merit.

19 Additionally, as explained above, "[e]xpert opinion is admissible and may defeat
 20 summary judgment if it appears the affiant is competent to give an expert opinion and the factual
 21 basis for the opinion is stated in the affidavit, even though the underlying factual details and
 22 reasoning upon which the opinion is based are not." *Bulthuis*, 789 F.2d at 1318 . Thus, even if
 23 the Court were to find that Plaintiff's experts' opinions lack foundation, which Plaintiff certainly
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 26
 27 claim that one year of credit monitoring was insufficient to adequately remedy the breach and
 28 harm.

1 believes they do not, the opinions would nonetheless be admissible to defeat Defendants' Motion
 2 for Summary Judgment.

3 Moreover, Defendants' motion to strike includes a chart with vague boilerplate objections
 4 to each paragraph in Plaintiff's expert reports without providing *any* basis for the evaluation of
 5 those objections. (*See* Mot. to Strike at 9.) Plaintiff is placed at a disadvantage to respond to
 6 vague objections not to mention the court in evaluating them. For such reasons, courts have
 7 rejected such boilerplate objections. *See Zyburra v. Metech Int'l., Inc.*, No. CV 00-11542, 2000
 8 WL 1920372, at *2 n. 2 (C.D. Cal. 2000) (rejecting boilerplate objections to evidence). One
 9 specific example is Defendants' claim that each paragraph of the Plaintiff's expert reports is
 10 "hearsay" and violate Fed. R. Evid. 801. *See id.* The non-specific nature of Defendants' hearsay
 11 allegations, however, makes them impossible for Plaintiff to respond, and as such, are useless
 12 and without merit. Defendants cite no basis to support their hearsay argument. In fact,
 13 Defendants do not even present an argument and Plaintiff is left to wonder – do Defendants'
 14 claim Plaintiff's expert's reports themselves are hearsay? Or do they claim the basis of the
 15 reports is hearsay?⁷ Notwithstanding, although Plaintiff believes that his experts' declarations
 16 are both admissible in their entirety, Fed. R. Evid. 703, "permits [] hearsay, or other inadmissible
 17 evidence, upon which an expert properly relies, to be admitted to explain the basis of the expert's
 18 opinion." *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254 (9th Cir. 1984) 1261-62 (citation
 19 omitted). Thus, Defendants' objections on the basis of alleged hearsay are incorrect.

20 Further, Defendants' argument that certain paragraphs of Van Dyke's Declaration bear on
 21 the legal issues is incorrect. Rather, Van Dyke's statements simply relate to an issue of fact, *i.e.*,
 22 what, in his opinion, is needed to protect Class members from further harm. Thus, Defendants'
 23 reliance upon *McHugh v. United Service Auto. Ass'n*, 164 F.3d 451 (9th Cir. 1999), involving
 24

25 ⁷ Similarly, Plaintiffs cannot even begin to counter Defendants' vague claim that Plaintiff's
 26 experts' opinions are speculation, *Defs. Brief* at 7, since Defendants neglected to provide any
 27 argument to reasoning to support their claim or to inform Plaintiff what was speculative about
 Plaintiff's experts' reports. Of note, they failed to even raise it as a boilerplate objection in their
 Exhibit A.

1 experts opinion upon the proper interpretation of terminology used in an insurance contact – a
 2 legal issue – is misguided.

3 **D. PLAINTIFF'S EXPERT OPINIONS PROVE THAT THERE IS AN**
 4 **INCREASED RISK OF IDENTITY THEFT FOR THOSE AFFECTED BY**
 5 **THE GAP DATA BREACH**

6 Defendant uses its motion to strike as a forum to argue that Plaintiff has not suffered a
 7 compensable injury, and thus lacks standing and is unable to state a claim. (*See* Mot. to Strike at
 8 3.) One, Plaintiff has already survived a Rule 12(b) motion here. Two, Defendant imports issues
 9 into its motion to strike that should be reserved for a motion for judgment on the pleadings, or a
 10 similar procedural vehicle. In fact, Defendants do address these issues in its motion for
 11 judgment on the pleadings, also currently before the Court, and merely use its motion to strike as
 12 a forum for rehashing these arguments to no discernable purpose. Thus, in an ironic twist, a
 13 motion properly reserved to strike redundant claims is in itself a redundant filing. By using its
 14 motion to strike to re-argue its motion for judgment on the pleadings and pre-argue its opposition
 15 to class certification, Defendant converts what should be a method of conserving the Court's
 16 resources, *see Fogerty*, 984 F.2d at 1527, into a means of wasting them.

17 At every turn, be it in the posture of class certification, summary judgment, or here, a
 18 motion ostensibly addressed at Plaintiff's experts, defendants raise the cry of "no injury" as the
 19 basis for the relief they seek. Defendants seek to "strike" Plaintiff's experts not because their
 20 testimony is "redundant, immaterial, impertinent, or scandalous" to the claims but because
 21 Defendants believe the claims to be unmeritorious. Assuming, for the sake of argument, that a
 22 motion addressed at whether or not an expert is qualified to opine on a matter (or the
 23 admissibility of the report) is the proper posture to re-raise the issue of standing, Plaintiff (yet
 24 again) points Defendants to this Court decision finding that Plaintiff has met the injury and
 25 standing requirements. *See Ruiz v. Gap, Inc.*, 540 F.Supp.2d 1121, 1126 (N.D. Cal. 2008) ("the
 26 Court finds that Ruiz has alleged an injury in fact."); *accord, e.g., Pisciotta v. Old Nat'l Bancorp*,
 27 499 F.3d 629, 634 (7th Cir.2007); *Caudle v. Towers, Perrin, Forster & Crosby, Inc.*, No. 07 Civ.

1 2480(PKC)(DFE), 2008 WL 4104035, at *6 (Aug. 28, 2008 S.D.N.Y.); *Doe v. Chao*, 540 U.S.
 2 614, 626 n. 10 (2004) (fees associated with running a credit report qualify as actual damages in
 3 action under the Privacy Act); *Witriol v. LexisNexis Group*, No. C05-02392 MJJ, 2006 WL
 4 4725713, at *6 (N.D. Cal. Feb. 10, 2006) (costs associated with monitoring and repairing credit
 5 impaired by the unauthorized release of private information sufficient for allegation of actual
 6 injury and monetary loss).

7 Not content to simply re-raise arguments previously raised (and at times addressed by the
 8 Court), Defendants also attack Plaintiff's claims under the guise of testing Plaintiff's experts'
 9 qualification. Specifically, Defendants argue that Plaintiff's experts, who opine on factual
 10 matters, are somehow irrelevant or inappropriate because their opinions support legal claims
 11 Defendants feel are unmeritorious. Further, while arguing that toxic torts jurisprudence is
 12 inappropriate, they nevertheless use it in support of their arguments. Thus, their circular logic is
 13 only buttressed by monumental boot-strapping.

14 First, using medical monitoring jurisprudence to fashion the parameters of credit
 15 monitoring claims is not an "inapt" analogy, as Defendants claim. (See Mot. to Strike at 1.) It is
 16 an analogy used by other courts that have recognized and fashioned the credit monitoring claim
 17 or remedy.⁸ See, e.g., *Caudle*, 2008 WL 4104035, at *7; *Stollenwerk v. Tri-West Healthcare*
 18 *Alliance*, No. Civ. 030185PHXSRB, 2005 WL 2465906, at *4 (D. Ariz. Sept 6, 2005)
 19 (*Stollenwerk I*, aff'd in part, rev'd in part, 254 Fed.Appx. 664, 666 (9th Cir. 2007) (*Stollenwerk*
 20 *II*).

21 Second, although an appropriate analogy, it is not without its limits. For example,
 22 Defendants argue on the one hand that analogies to toxic tort claims are "inapt", yet argued
 23 during class certification, and again here, that based on toxic tort jurisprudence, future injury

24
 25 _____
 26 ⁸ That said, it is not always the true that the claim or remedy has been meritorious based on
 27 the facts and records of those cases. Plaintiff merely points out that a credit monitoring remedy
 28 may be analogized, to a certain extent, on medical monitoring jurisprudence.

1 claims should somehow be treated differently than present injury claims. (See Mot. to Strike at
 2 1.) However, ignoring the conflicting approach, as discussed in the class briefing, limitations
 3 placed on limited fund, no-opt out toxic tort settlements, have no relevance to data breach cases.
 4 Cf. (See Defs.' Class Opp. Br. at 11) (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591
 5 (1997)⁹ and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)) with Plaintiff's Reply Brief in
 6 Support of Motion for Class Certification, Docket No. 117, at 3-4, 7, 12. As courts have noted,
 7 the analogy to medical monitoring, although appropriate, is nevertheless limited. *Stollenwerk I*,
 8 2005 WL 2465906, at *4 ("identity theft and credit monitoring must still be differentiated from
 9 toxic torts and medical monitoring"); *see also* McLaughlin On Class Actions: Law And Practice
 10 § 4.02 ("There is no *per se* prohibition against certifying a single class including both presently
 11 injured and future claimants."); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent*, 148
 12 F.3d 283, 313 (3d. Cir. 1998)(same); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 269 (2d. Cir.
 13 2006)(same). In other words, in Defendants' view, analogy to toxic torts and medical
 14 monitoring jurisprudence is *only* appropriate when they serve to buttress Defendants' position.
 15 Thus, it seems that Defendants seek to have their proverbial cake and eat it too.

16 Finally, in order to fashion a credit monitoring remedy, it is entirely reasonable for this
 17 Court to look to *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965 (1993) even though *Potter*
 18 did not "involve identity theft or the misuse of personal information". (Cf. Mot. to Strike at 1.)
 19 Plaintiff outlined the *Potter* elements from which the Court can fashion an appropriate credit
 20 monitoring remedy. (See Plaintiff's Memorandum of Points and Authorities in Opposition to
 21 Defendants' Motions for Summary Judgment Or, in the Alternative, Summary Adjudication,
 22 Docket No. 104 at 10-13); *accord Stollenwerk I*, 2005 WL 2465906, at *1. In *Stollenwerk I*, the
 23 elements created were: (1) significant exposure of sensitive personal information; (2) a
 24 significantly increased risk of identity fraud as a result of that exposure; and (3) the necessity and

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 26 ⁹ *Amchem* also involved a situation where the entire class was unknowable whereas here,
 27 the putative class has been identified by the letters sent.

1 effectiveness of credit monitoring in detecting, treating, and/or preventing identity fraud. *Id.*
 2 Plaintiff and his experts' reports provide evidence in support of this test.

3 Ostensibly recognizing that credit monitoring may be fashioned from medical monitoring
 4 jurisprudence, Defendants next contend that the expert opinions "should be held inadmissible"¹⁰
 5 because they are irrelevant and will not assist the Court in understanding the evidence or in
 6 determining any fact in issue". (*See* Mot. to Strike at 2.) (citing Fed. R. Evid. 702). To
 7 compound this confusion, Defendants next add that in order to "recover for a claim of future
 8 injury" his experts must meet the standard set out in *Potter*. (*See* Mot. to Strike at 2.) Namely,
 9 since Plaintiff's "expert reports...fail to show that it is more likely than not"¹¹ that a member of
 10 the putative class will suffer identity theft as a result of the laptop theft", his experts' reports
 11 must be stricken. However, that is not the appropriate standard by which this (albeit confused)
 12 motion should be evaluated.

13 Although *Potter* informs the elements of a credit monitoring claim, it cannot govern the
 14 standard by which the admissibility of his evidence can be judged. First, as long as the "evidence
 15 is relevant and the methods employed are sound, neither the usefulness nor the strength of
 16 statistical proof determines admissibility under Rule 702." *Obrey*, 400 F.3at d 691 (citing
 17 *Metabolife Int'l*, 264 F.3d at 843).

18 Second, *Potter*'s holding, and the reasons therefore, highlight its inapplicability to data
 19 breach cases. There, the court stated:

20
 21
 22 ¹⁰ Thus, by the second page of the Motion, Defendants have moved from a motion to strike
 23 (ostensibly governed by Rule 12(f)), to a challenge on admissibility based on irrelevancy under
 24 FRE 702 (not 401). Thus, it is unclear if Plaintiff should address the challenge under the
 25 standard in place under FRCP 12(f), FRE 401, FRE 702 or some other vaguely defined approach
 26 of Defendants' choosing. The shifting sand upon which Defendants' motion is based cannot
 27 support their arguments.

28 ¹¹ More likely than not in this context essentially amounts to an increase in risk greater than
 29 50%. *See generally Valencia v. United States*, No. 05-0472, 2008 WL 669917, at *9 (E.D. Cal.
 30 Mar. 7, 2008). Plaintiff's expert opined that the risk of identity theft increased by 19%. Thus,
 31 Defendants are arguing this differential (between 19% and 50.1%) disqualifies the expert and
 32 reports and supports their motion to strike. Defendants are wrong.

[w]e cannot say that it would never be reasonable for a person who has ingested toxic substances to harbor a genuine and serious fear of cancer where reliable medical or scientific opinion indicates that such ingestion has significantly increased his or her risk of cancer, but not to a probable likelihood. Indeed, we would be very hard pressed to find that, as a matter of law, a plaintiff faced with a 20 percent or 30 percent chance of developing cancer cannot genuinely, seriously and reasonably fear the prospect of cancer. Nonetheless, we conclude, for the public policy reasons identified below, that *emotional distress caused by the fear of a cancer* that is not probable should generally not be compensable in a negligence action.

6 Cal. 4th at 990 (emphasis added). The reason that *Potter* chose “more likely than not” over a “likely and reasonable” standard for negligent infliction of emotional distress had to do with public policy concerns, including: (1) exposure to carcinogens was a daily occurrence and limiting emotional distress claims for fear of cancer was reasonable; (2) access to prescription drugs could be limited; (3) medical malpractice insurance costs would rise as would the cost of physician services; and (4) the need for predictability in the applicable standard. *Id.* at 991-994. None of these public policy reasons apply to the present scenario and Defendants have not argued otherwise—neither here in a challenge to an expert nor in the summary judgment briefing where it should have been appropriately addressed.

Finally, in the discussion of the expert reports in *Stollenwerk I*, as well as the test fashioned for the credit monitoring claim, it is clear that the *Potter* standard would not apply outside of emotional distress claims in toxic tort cases. There, the court admitted, reviewed, and applied a report that fell well short of the expert reports in the record here. Namely, in *Stollenwerk I*, plaintiffs’ expert opinion was rejected because he opined merely that “Plaintiffs are at an increased risk of experiencing identity fraud for the next seven years, *but fail[ed] to indicate the mathematical degree to which the risk is increased* despite stating that his conclusions were arrived at as a matter of scientific probability.” 2005 WL 2465906, at * 5 n.2 (emphasis added). Unlike the *Stollenwerk* report that was nevertheless admissible, albeit not dispositive, the Van Dyke report provides the “mathematical degree to which the risk is increased”. *Id.* Moreover, *Stollenwerk I* held that the second part of the test was “significantly increased risk of identity fraud” not “more likely than not” identity fraud will occur. Finally,

1 “[d]efining ‘significant’ for the purpose of awarding credit monitoring is a matter of law for the
2 Court, however, and mere allegations that an increase is significant do[es] not constitute
3 evidence.” *Id.* at *5. Mr. Van Dyke did more than make mere allegation of significance.

4 Thus, under *Stollenwerk I*, the proper test is “significant” and not “more likely than not”.
5 A similar standard should be adopted here. Mr. Van Dyke¹² has opined that Class members are
6 at a 19% increased risk of experiencing identity fraud.¹³ Plaintiff believes that this is
7 “significant” as defined by other courts. *See, e.g., Reid v. State*, 964 S.W.2d 723, 727-28 (Tex.
8 App. 1998) (admitting expert testimony into evidence, based on his assertion that a very
9 significant percentage - about ten percent - of cases of Munchausen Syndrome By Proxy result in
10 fatality); *Jarvis v. Providence Hosp.*, 444 N.W.2d 236, 238 (Mich. Ct. App. 1989) (expert
11 testimony that a two percent chance that medical samples may contract hepatitis is significant).
12 Plaintiffs’ expert reports thus meet *Stollenwerk I*, are properly admissible and should not be
13 stricken (or excluded).

14 | III. CONCLUSION

15 Based on the foregoing, Plaintiff respectfully requests that the Court deny Defendants'
16 motion to strike in its entirety.

17 | Dated: March 16, 2009
Respectfully submitted,

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22 ¹² Although Ponemon's report touches upon the increased risk of identity theft to the Class,
23 he does not attempt to quantify the increased risk since that is not the purpose of his report. *Cf.*
24 (*See Mot. to Strike at 2 with Rivas MSJ Decl., Ex. N*) Ponemon's purview was to testify as to the
purpose of the laptop theft and no more. Thus, the "more likely than not" or even the
"significant increased risk" standard simply cannot apply in evaluating his report.

25 ¹³ Defendants also seek the reports stricken because of their constant, yet conclusory
26 refrain, that there “have been zero *confirmed* instances of identity theft attributed to the stolen
27 laptop.” (See Mot. to Strike at 2.) (emphasis added). Of course, it is Gap who took it upon itself
to “confirm” such instances without defined protocols but based on vague, ad-hoc conversations
by customer service representatives.

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